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REFORMING THE IRS: THE EFFECTIVENESS OF THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998

I. INTRODUCTION

Last year, members of the Senate Finance Committee listened while taxpayers told Internal Revenue Service ("IRS") "horror stories" during three days of hearings.¹ At these hearings, taxpayers testified to intrusive, unfair, and arbitrary acts committed by the IRS in its efforts to administer the tax code ("the code").² Furthermore, IRS agents confessed in the hearings to an established policy of intimidating weak and poor taxpayers in order to make examples of them.³ This testimony was the impetus for the reformation of the IRS.

On July 22, 1998, the President signed into law the IRS Restructuring and Reform Act of 1998⁴ (the "Reform Act").⁵ The Reform Act is the most recent Congressional response to the American taxpayer's dissatisfaction with the IRS. The Reform Act purports to comprehensively reform the IRS, making it more user-friendly and more accountable to taxpayers.⁶ Additionally, the Reform Act is intended to enhance the fairness of the tax collection process, solve the problems created by the complicated code, and restore public confidence in the way the IRS en-

1. See *IRS Restructuring: Hearings on Internal Revenue Service Restructuring Before the Senate Finance Comm.*, 105th Cong., (1998) (statement of Robert S. Schriebman), available in 1998 WL 47010 (describing examples of abuses such as deprivation of due process, commission of perjury by agents, and adversarial approach).

2. See Ann Reilly Dowd, *Win More at the New IRS*, MONEY, Jan. 4, 1998, at 82, 82. See, e.g., *Hearings on IRS Restructuring and Oversight Before the Senate Finance Committee*, 104th Cong. (1988) (statement of Congressman Rob Portman), available in 1998 WL 8991317; *Hearings on IRS Restructuring and Oversight Before the Senate Finance Committee*, 104th Cong. (1988) (statement of former IRS Commissioner Donald C. Alexander), available in 1998 WL 8991357.

3. See 143 CONG. REC. H10029 (daily ed. Nov. 5, 1997) (statement of Rep. Paul).

4. See IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, §§ 1001-9016, 112 Stat. 685 (1998) [hereinafter "Reform Act"].

5. See MONDAQ BUSINESS BRIEFING, IRS REFORM ACT SIGNED, Sept. 14, 1998, available in 1998 WL 9018267; Robert Burns, *Clinton Signs Popular Bill to Make IRS Simpler, Fairer*, THE ATLANTA CONST., July 23, 1998, at A6. Both the House of Representatives and the Senate passed the Reform Act by overwhelming margins; the House voted 402-8, while the Senate voted 96-2. See Jeff A. Schnepfer, *Restructuring and Reforming the Internal Revenue Service*, USA TODAY, Sept. 1, 1998 (Magazine), at 15.

6. See 143 CONG. REC. H10001 (daily ed. Nov. 5, 1997) (statement of Rep. Dreier).

forces the code.⁷ Specifically, the Reform Act shifts the burden of proof from the taxpayer to the IRS in any court proceeding relating to the determination of tax liability.⁸ Also, the Reform Act calls for the establishment of a nine member IRS Oversight Board.⁹ Congressional sponsors of the Reform Act claim that this Oversight Board "will bring private sector expertise to the management and administration of the [IRS]."¹⁰ Finally, the Reform Act intends to extend the rights and protections of taxpayers by enhancing their ability to sue the IRS for civil damages.¹¹

This Comment examines whether the Reform Act will effectively address taxpayers' difficulties in dealing with the IRS. It anticipates the Reform Act's effect on existing law and on IRS administration. Additionally, this Comment identifies problems resolved and created by the Reform Act. Finally, the Comment concludes that: (1) reformation of the IRS is necessary; (2) the Reform Act's shifting of the burden of proof in tax disputes will not substantially assist taxpayers because such a shift will occur only in limited circumstances and if it does occur, it may make the IRS more aggressive; (3) the creation of the IRS Oversight Board improves oversight and guidance of the IRS only marginally; yet, the language of the Reform Act which creates the board is not broad enough to make the IRS significantly more accountable to taxpayers; and (4) the Reform Act will not substantially enhance taxpayer ability to sue the government for damages caused by IRS employees' wrongful conduct, as many of the limitations of the amended statutes will persist.

This Comment has five main sections. Part II discusses the Reform Act's origins, three of its major provisions, and the reasons for its enactment. Part III examines the Reform Act's shift of the burden of proof from the taxpayer to the IRS in any tax proceeding. Specifically, this section analyzes the rationale for the traditional assignment of the burden of proof on the taxpayer and assesses the anticipated effects of a shift to the IRS. Part IV critiques the utility of the IRS Oversight Board created by the Reform Act. This section examines the role of advisory committees in the administration of federal government and enumerates the responsibilities and duties assigned to the IRS Oversight Board by

7. *See id.*

8. *See* Reform Act, *supra* note 4, at § 3001, 112 Stat. 726.

9. *See id.* at § 1101, 112 Stat. 685, 691 (amending § 7802(b)(1)).

10. 143 CONG. REC. H10002 (daily ed. Nov. 5, 1997) (statement of Rep. Frost).

11. *See* Reform Act, *supra* note 4, at §§ 3101-3102, 112 Stat. 730.

the Reform Act. Part V discusses traditional civil remedies available to taxpayers and focuses on two civil remedies the Reform Act amends. Finally, Part VI assesses the effectiveness of the Reform Act's major provisions in light of taxpayer dissatisfaction with the IRS. It suggests that further legislative modifications be considered by Congress in its future attempts to reform the IRS and lessen the American tax problem.

II. LEGISLATIVE BACKGROUND

Congressional attempts to reform the IRS are more than a product of recent taxpayer protests.¹² In 1988 and 1996, Congress enacted Taxpayer Bill of Rights legislation to make procedural safeguards and remedies available to taxpayers.¹³ Additionally, Congress subsidized an IRS reorganization program called the Tax Systems Modernization Program (the "TSM program").¹⁴ The TSM program attempted to reform the IRS by implementing a series of projects aimed at modernizing the IRS and preparing it to handle the challenges of administering the tax system in the 1990s.¹⁵

In the opinion of a majority of American taxpayers, these attempts to reform the IRS have not succeeded.¹⁶ The TSM program has been characterized as "chaotic" and "ad hoc" and is running substantially over budget.¹⁷ Also, taxpayers continue to come forward with horror stories detailing abusive tactics employed by IRS agents.¹⁸ In response to these stories, one member of Congress conceded that the IRS "is an

12. See generally Creighton R. Meland, Jr., *Omnibus Taxpayers' Bill of Rights Act: Taxpayers' Remedy or Political Placebo?* 86 MICH. L. REV. 1787, 1789-91 (1988).

13. See Taxpayer Bill of Rights, Pub. L. No. 100-647, Title VI Subtitle J, 102 Stat. 3730 (1988); Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996). For a more thorough discussion on the Taxpayer Bill of Rights legislation of 1988 see Meland, *supra* note 12.

14. See generally Margaret Milner Richardson, *Reinventing the Internal Revenue Service*, 1994 FED. B.A. SEC. TAX'N REP. 1.

15. See *id.* Specifically, the TSM program attempts to reorganize the IRS by replacing archaic computer equipment, restructuring and reducing the size of the IRS's national and regional offices, creating program areas responsible for the implementation of long range strategies and objectives, and consolidating technological resources. See *id.* at 1-2.

16. See Dowd, *supra* note 2, at 82. In a November 1997 poll, 48% of the respondents said the IRS needed to be completely overhauled. Additionally, another 10% said the agency should be eliminated altogether. See *id.*

17. See James J. Hall, *Critics Blast IRS's Tax Systems Modernization Program*, West's Legal News, available in 1996 WL 259761 (April 12, 1996).

18. See *IRS Restructuring: Hearings on Internal Revenue Service Restructuring Before the Senate Finance Comm.*, 105th Cong., (Feb. 5, 1998) (statement of Robert S. Schrieberman) available in 1998 WL 47010.

agency out of control.”¹⁹

The IRS Reform and Reconstruction Act of 1998 seeks to reform the IRS where the Taxpayer Bill of Rights legislation, the TSM program, and other reformation attempts have failed. Members of Congress assert that the Reform Act is the most comprehensive reform of the IRS in over four decades.²⁰ Sponsors of the Reform Act claim that this legislation confronts a basic problem that previous reformation efforts have not addressed: the complexities of the Internal Revenue Code.²¹ These sponsors claim that the Reform Act will serve as the first step in resolving those complexities.²² The Reform Act contains provisions which are intended to “substantially strengthen taxpayers’ rights in dealing with the IRS.”²³ Although sponsors assert that what ails the IRS can only be solved by replacing the code with a new tax system.²⁴ They also believe that in the interim the Reform Act will provide more fair treatment and efficient customer service for taxpayers.²⁵

The Reform Act facilitates a comprehensive reform of the IRS through the adoption and amendment of numerous sections of the code. This Comment focuses on three sections of the Reform Act and their role in the reformation of the IRS. These sections of the Reform Act are: (1) shifting the burden of proof in a tax dispute from the taxpayer to the IRS;²⁶ (2) creating an IRS Oversight Board;²⁷ and (3) enhancing taxpayers’ rights to sue the government for civil damages.²⁸

III. SHIFTING THE BURDEN OF PROOF

This section discusses the provisions of the Reform Act which shift

19. 143 CONG. REC. H10042 (daily ed. Nov. 5, 1997) (statement of Rep. Crane).

20. See 143 CONG. REC. H10001 (daily ed. Nov. 5, 1997) (statement of Rep. Dreier).

21. See *id.* at H10024 (statement of Rep. Camp) (stating that the code has over 17,000 pages of laws and regulations, 480 forms, and 280 forms explaining those forms); see also DAVID BURNHAM, *A LAW UNTO ITSELF* 19 (1989). Burnham indicates that Congressional attempts to reform the IRS have resulted in a tax code “printed on 2,200 pages, not including the 7,600 pages of regulations, which also have the force of the law.” *Id.* For a summary of previous Congressional reformation attempts, see Shirley D. Peterson, *Essay, Reform and Reinvention: The Internal Revenue Code and the Internal Revenue Service*, 47 SMU L. REV. 51, 52 (1993) (citing DAVID F. BRADFORD, U.S. TREASURY DEPT. BLUEPRINTS FOR BASIC TAX REFORM (2d ed. 1984)).

22. See 143 CONG. REC. H10022 (daily ed. Nov. 5, 1997) (statement of Rep. Archer).

23. *Id.* at H10002 (statement of Rep. Frost).

24. See *id.* at H10022 (statement of Rep. Archer).

25. See *id.* at H10004 (statement of Rep. Christensen).

26. See Reform Act, *supra* note 4, at § 3001, 112 Stat. 726.

27. See *id.* § 1101, 112 Stat. 691.

28. See *id.* §§ 3101, 3102, 112 Stat. 727, 730.

the burden of proof in any court proceeding relating to a tax dispute.²⁹ It examines the rationale for assigning the taxpayer the burden of proof, the language of the Reform Act which shifts the burden to the IRS, and the anticipated effects of such a shift. This section concludes that this provision of the Reform Act is an ineffective attempt to reapportion power from the IRS to taxpayers and that shifting the burden of proof may cause the IRS to become more aggressive in its operating procedures.

A. The Burden of Proof and Rationale for its Assignment in a Tax Proceeding

The role of the burden of proof is fundamental in resolving disputes between parties.³⁰ A party with the obligation to persuade a neutral third party that he or she acted or refrained from acting in conformity "with a predetermined pattern of conduct[.]"³¹ bears the burden of proof.³² If a party with the burden of proof is unable to meet its obligation, the issue will be decided against that party.³³

A tax dispute can proceed in three venues: the Tax Court, a federal district court, or the Claims Court.³⁴ Generally, the taxpayer has borne the burden of proof in each of these venues.³⁵ In Tax Court, a taxpayer must prove that the commissioner's assessment of tax is incorrect.³⁶ In a federal district court or the Claims Court, a taxpayer is required to prove that the commissioner's assessment of tax is incorrect and the taxpayer must show the amount to which he is entitled or, in the alternative, that he owes no tax at all.³⁷

29. See § 3001, 112 Stat. at 726.

30. See Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 HASTINGS L.J. 239, 245 (1988) (citing C. CHAMBERLAYNE, A TREATISE ON THE MODERN LAW OF EVIDENCE § 931, at 1093 (1911)).

31. Martinez, *supra* note 30, at 244.

32. See *id.* (citing JAMES & HAZARD, CIVIL PROCEDURE, § 7.6, at 314 (3d ed. 1985)); see also MCCORMICK, EVIDENCE § 336, at 947-48 (3d ed. 1984); 9 WIGMORE, EVIDENCE § 2485, at 285 (J. Chadbourn rev. 1981).

33. See Martinez, *supra* note 30, at 244; see also MCCORMICK, *supra* note 32, at 947-48; WIGMORE, *supra* note 32, at 285.

34. See Martinez, *supra* note 30, at 255.

35. See Martinez, *supra* note 30, at 257.

36. See Martinez, *supra* note 30, at 257 (citing *Helvering v. Taylor*, 293 U.S. 507, 515 (1934)); *Welch v. Helvering*, 290 U.S. 111, 115 (1933). The taxpayer has also been assigned the burden of proof in tax court cases by Tax Court Rule 142. See TAX CT. R. 142. The rule states: "The burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court . . ." *Id.* at 142(a).

37. See *United States v. Janis*, 428 U.S. 433, 440 (1976) (holding that a taxpayer who

With respect to the common law rationale for assigning taxpayers the burden of proof,³⁸ Leo Martinez explains that courts have assigned the burden of proof after determining which party must show the affirmative of an issue, which party is the plaintiff, and which party possesses the objective evidence in a dispute.³⁹

An example of the first factor can be found in *Helvering v. Taylor*,⁴⁰ where Judge Stone opined that in an action to recover taxes paid, the burden was on the taxpayer "to show not merely that the assessment was erroneous, but also the amount to which he was entitled."⁴¹ In so holding, the Court assigned the burden of proof to the party having to show the affirmative of an issue.⁴²

Furthermore, the common law rationale assigns the burden of proof to the plaintiff taxpayer in a dispute.⁴³ In *Rockwell v. Commissioner*,⁴⁴ the Ninth Circuit Court of Appeals held that "from time immemorial, the burden of proof—i.e., the burden of persuasion—is on the plaintiff."⁴⁵

Finally, courts have assigned taxpayers the burden of proof because they possess the objective evidence necessary to determine their liability.⁴⁶ In *Campbell v. United States*,⁴⁷ the Court stated that a rule based on fairness "does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary."⁴⁸ Despite this over-

shows merely that an assessment is somewhat erroneous has not met a burden consisting of two elements); see also *Helvering v. Taylor*, 293 U.S. 507, 514-15 (1934); *Compton v. United States*, 334 F.2d 212, 216 (4th Cir. 1964).

38. See generally Martinez, *supra* note 30, at 267-73. Martinez discusses other common law factors for assigning the burden such as which party is alleging the least likely scenario, which party is alleging the disfavored contention, and an allocation according to statute. See *id.*

39. See *id.*

40. 293 U.S. 507 (1934).

41. *Id.* at 514.

42. See *id.*; see also Martinez, *supra* note 30, at 249 (citing *Arthur v. Unkart*, 96 U.S. 118, 122 (1877)); *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.*, 178 F.2d 541, 547 (9th Cir. 1949); *Bauer v. Clark*, 161 F.2d 397, 400 (7th Cir. 1947); *Gilmore v. United States*, 93 F.2d 774, 776 (5th Cir. 1938).

43. See Martinez, *supra* note 30, at 269 (citing *Helvering v. Taylor*, 293 U.S. 507, 514 (1935)); *Wickwire v. Reinecke*, 275 U.S. 101, 105 (1927).

44. 512 F.2d 882 (9th Cir. 1975).

45. *Id.* at 887.

46. See Martinez, *supra* note 30, at 271-72. "The common-law allocation of the burden of proof to the party in possession of the evidence is clearly appropriate." *Id.* at 272; see also MCCORMICK, *supra* note 32, at 950; WIGMORE, *supra* note 32, at 290.

47. 365 U.S. 85 (1961).

48. *Id.* at 96.

whelming amount of common law authority for placing the burden of proof on taxpayers, the Reform Act nevertheless shifts it to the IRS by statute.

B. Burden of Proof Under the Reform Act

The Reform Act shifts the burden of proof from the taxpayer to the IRS.⁴⁹ Sponsors of the Reform Act claim that the shift no longer permits the IRS to treat taxpayers as "guilty until proven innocent."⁵⁰ However, the shift in the burden of proof may not be the big taxpayer victory that many in Congress perceive it to be.

The shift of the burden of proof provided in the Reform Act will be limited in its application. The Reform Act provides that a shift of the burden occurs only if "a taxpayer introduces *credible evidence* with respect to any factual issue relevant to ascertaining the liability of the taxpayer"⁵¹ Furthermore, the Reform Act defines three requirements of the taxpayer where the burden of proof shifts to the IRS: A taxpayer must comply with the requirements of the code "to *substantiate* any item;"⁵² must maintain all records required by the code;⁵³ and *cooperate* with reasonable requests by the IRS for "witnesses, information, documents, meetings and interviews"⁵⁴ Thus, a shift in the burden would not be an absolute certainty for the taxpayer.

C. Effects of Shifting the Burden of Proof

The Reform Act's shift of the burden of proof in any court proceeding will not facilitate a dramatic reapportionment of power from the IRS to taxpayers because the shift of the burden will occur in only limited circumstances. Even if it does occur, it will not relieve taxpayers from the burden of substantiating items on their tax returns and it will create other burdens upon them. As previously mentioned, in order to shift the burden of proof, the Reform Act requires that a taxpayer introduce credible evidence, comply with the requirements of the code, maintain all records and cooperate with the reasonable requests of the IRS.⁵⁵ With respect to the well-known complexities of the code,⁵⁶ judi-

49. See Reform Act, *supra* note 4, at § 3001, 112 Stat. 726.

50. 143 CONG. REC. H10003 (daily ed. Nov. 5, 1997) (statement of Rep. Weller).

51. § 3001(a)(1), 112 Stat. at 727.

52. § 3001(a)(2)(A), 112 Stat. at 727.

53. § 3001(a)(2)(B), 112 Stat. at 727.

54. *Id.*

55. See *supra* notes 51-54 and accompanying text.

cial interpretation of this provision's requirements would undoubtedly vary, creating uncertainty as to when a shift in the burden of proof would actually occur. One can easily foresee courts struggling with the definitions of "credible evidence,"⁵⁷ "substantiation,"⁵⁸ and "cooperation with reasonable requests."⁵⁹

Therefore, the Reform Act's shift of the burden of proof will not significantly empower taxpayers because they will be required to substantiate items in their tax returns in order to cause such a shift.⁶⁰ "Substantiation requirements include any requirement of the Code or regulations that the taxpayer establish an item to the satisfaction of the Secretary."⁶¹ For example, the IRS requires taxpayers to substantiate charitable contributions and meals, entertainment, and travel expenses taken on their tax returns.⁶²

If a taxpayer substantiates an item on his tax return, the burden of proof is shifted to the IRS. Thus, it appears as though the taxpayer has already assumed the burden of proof. In effect, this provision of the Reform Act perpetuates the presumption that the IRS's determinations are correct until rebutted by a taxpayer.⁶³ This presumption would remain an "effective procedural device" by which the IRS could avoid assuming the burden of proof by requiring taxpayers to produce evidence substantiating their claims.⁶⁴ Consequently, a shift in the burden of proof may

56. See Peterson, *supra* note 21, at 51. The former IRS Commissioner stated: "[t]he current level of complexity undermines compliance and breeds disrespect for the law and for those agencies of government charged with its interpretation and administration." *Id.* at 51-52; see also BURNHAM, *supra* note 21 and accompanying text.

57. See Conf. Report on H.R. 2676, *Internal Revenue Service Restructuring and Reform Act of 1998*, 144 CONG. REC. H5100-01, *H5161 reprinted in RESEARCH INSTITUTE OF AMERICA, RIA'S COMPLETE ANALYSIS OF THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998, 1936 at ¶ 5019 [hereinafter RIA, ANALYSIS OF THE REFORM ACT]. "Credible evidence is the quality of evidence which, after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted." *Id.*

58. See *infra* note 61 and accompanying text.

59. See generally RIA, ANALYSIS OF THE REFORM ACT 1936, at ¶ 5019. "A necessary element of cooperating with the Secretary is that the taxpayer must exhaust his or her administrative remedies (including any appeal rights provided by the IRS)." *Id.*; see also I.R.C. § 6201(d) (1997).

60. See *supra* notes 52, 61 and accompanying text.

61. See RIA, ANALYSIS OF THE REFORM ACT, *supra* note 57, at 1937, ¶ 5019.

62. See *id.* at 1936-37.

63. See generally Sean M. Moran, *The Presumption of Correctness: Should the Commissioner be Required to Carry the Initial Burden of Production*, 55 FORDHAM L. REV. 1087 (1987).

64. See *id.* at 1108.

not significantly relieve a taxpayer's tax burden.

Additionally, a shift in the burden of proof may prove to be an ineffective attempt to assist taxpayers because it may force the IRS to further intrude into the lives of taxpayers.⁶⁵ IRS agents, knowing they would carry the burden of proof, may want "more records than ever" to support their claims.⁶⁶ Similarly, one commentator stated that in such an instance, "the IRS would likely use its summons power to collect documents and testimony from taxpayers more often."⁶⁷ As a result, taxpayers may bear a "paperwork burden."⁶⁸

Finally, a shift of the burden of proof may have a negative effect on the voluntary compliance system employed by the IRS.⁶⁹ Under the voluntary compliance system, the IRS depends upon citizens to "come forward and meet their obligations under the revenue laws."⁷⁰ However, under the Reform Act citizens will have less incentive to voluntarily remit their taxes because they possess the evidence necessary to determine their own tax liability; yet the IRS will have the burden to prove this tax liability.⁷¹

IV. THE IRS OVERSIGHT BOARD

This section focuses on the provisions of the Reform Act creating the IRS Oversight Board. It will examine the roles that advisory committees generally assume in the administration of the federal government and the particular duties delegated to the IRS Oversight Board by the Reform Act. Finally, this section concludes that the IRS Oversight Board will marginally improve oversight and guidance of the IRS. However, the language of the Reform Act that creates the Oversight Board is not broad enough to allow the Oversight Board to suggest and implement changes that will substantially improve IRS management.

65. See Martinez, *supra* note 30, at 280. Martinez postulates that the IRS would further intrude upon taxpayers in response to an anticipated increase in taxpayer cheating. See *id.*; see also Dowd, *supra* note 2, at 84; Robert Dodge, *Taxing Situation: IRS Agents May Require More Data To Build Cases*, THE SACRAMENTO BEE, Aug. 13, 1998, at E1.

66. Dodge, *supra* note 65, at E1.

67. Dowd, *supra* note 2, at 84.

68. Dodge, *supra* note 65, at E1 (quoting James Maule, Villanova University).

69. See Martinez, *supra* note 30, at 281 (citing *United States v. Fowler*, 794 F.2d 1446, 1451 (9th Cir. 1986)).

70. Martinez, *supra* note 30, at 281.

71. See *id.* at 279.

A. *The Role of Advisory Committees in the Administration of the Federal Government*

Advisory committees, such as the IRS Oversight Board, enable "private citizens throughout the country to have a direct voice in national programs and policies."⁷² Typically, advisory committee members are delegated decision-making duties that would otherwise rest with the government.⁷³ These committees have served as "a useful and beneficial means of furnishing expert advice, ideas and diverse opinions to the Federal Government."⁷⁴ So prevalent is their existence that they have come to be known as the "fifth branch of government."⁷⁵ According to Professor Harold Abramson, Congress delegates governmental tasks to advisory committees for four primary reasons: (1) the expertise of persons appointed to the committees;⁷⁶ (2) the reduced likelihood that advisory committee decisions will be affected by political influence;⁷⁷ (3) the lesser number of bureaucratic and administrative requirements imposed upon advisory committees;⁷⁸ and (4) the consistent and continuous attention advisory committees can commit to the decision-making process.⁷⁹

Despite their utility, advisory committees have been criticized for a number of reasons.⁸⁰ Congress has criticized advisory committees as

72. Mary Kathryn Palladino, *Ensuring Coverage, Balance, Openness and Ethical Conduct For Advisory Committee Members Under the Federal Advisory Committee Act*, 5 ADMIN. L.J. 231, 231 (1991) (citing R. WEGMAN, *THE UTILIZATION AND MANAGEMENT OF FEDERAL ADVISORY COMMITTEES*, REPORT OF THE KETTERING FOUNDATION 2 (1982)).

73. See David Faure, *The Federal Advisory Committee Act: Balanced Representation and Open Meetings in Conflict With Dispute Resolution*, 11 OHIO ST. J. ON DISP. RESOL. 489, 489 (1996).

74. 5 U.S.C. app. II § 2(a) (1989).

75. 117 CONG. REC. H2750 (daily ed. Feb. 17, 1971) (statement of Rep. Monagan) reprinted in CONGRESSIONAL RESEARCH SERVICE, *FEDERAL ADVISORY COMMITTEE ACT: SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS*, at 259 (1978) [hereinafter *FACA SOURCE BOOK*]; see also Palladino, *supra* note 72, at 231.

76. See Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 178-79 (1989); see also JOHN P. COMER, *LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES* 18 (1927).

77. See Abramson, *supra* note 76, at 179-80; see also JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 4-6 (1980); JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 111 (1938).

78. See Abramson, *supra* note 76, at 180; see also COMER, *supra* note 76, at 16-17.

79. See Abramson, *supra* note 76, at 180; see also LOUIS JAFFE, *CONTROL OF ADMINISTRATIVE ACTION* 35-37 (1965).

80. See Richard O. Levine, *The Federal Advisory Committee Act*, 10 HARV. J. ON LEGIS. 217, 219 (1973); Faure, *supra* note 73, at 489-90.

being "inefficient and wasteful of resources."⁸¹ Additionally, advisory committees are criticized for making decisions under a "veil of secrecy,"⁸² and contrary to public interest.⁸³ In response to these allegations, Congress enacted the Federal Advisory Committee Act (FACA),⁸⁴ which was designed to cure the inefficiencies of advisory committees⁸⁵ and prevent them from becoming too powerful.⁸⁶ However, scrutiny of advisory committees persists.⁸⁷

B. *The Duties of the IRS Oversight Board*

Supporters of the Reform Act claim that it creates an oversight board which "bring[s] private sector expertise to the management and administration of the [IRS]."⁸⁸ In general, the Reform Act requires that the Oversight Board "oversee the Internal Revenue Service in its administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws . . ."⁸⁹ Specifically, the Reform Act charges the Oversight Board with the responsibility of reviewing and approving the IRS budget and the strategic and operational plans of the IRS.⁹⁰ Also, the Oversight Board is authorized to make management recommendations to the President regarding the appointment of the IRS Commissioner.⁹¹ Similarly, the Oversight Board may review the IRS Commissioner's selection and evaluation of various

81. Levine, *supra* note 80, at 219 (citing *Hearings on Advisory Committees Before the Subcomm. on Intergovernmental Relations of the Senate Government Operations Comm.*, 92d Cong., 1st Sess., pt. 1 at 75, pt. 2 at 305-43 (1971) [hereinafter 1971 Senate Hearings]).

82. See Palladino, *supra* note 72, at 232-33; see also *Comm. on Government Operations, Amending the Administrative Expenses Act of 1946, and for Other Purposes*, H.R. REP. NO. 85-579, at 5 (1951), reprinted in FACA SOURCE BOOK at 259 (stating additional criticisms of advisory committees).

83. See Levine, *supra* note 80, at 219 (citing 1971 Senate Hearings, *supra* note 81, at pt. 3, at 983-1008 (testimony of Ralph Nader)).

84. The Federal Advisory Committee Act, Pub L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. II (1988)).

85. See *House Comm. on Government Operations, The Role and Effectiveness of Federal Advisory Committees*, H.R. REP. NO. 1731, 91ST CONG., 2D SESS. 4 (1970) reprinted in FACA SOURCE BOOK at 215.

86. See Levine, *supra* note 80, at 225.

87. See generally Palladino, *supra* note 72, at 235-71. Palladino criticizes FACA, contending that it contains language that is difficult to interpret; such as "advisory committee" and "balanced representation." See *id.* at 235-36.

88. 143 CONG. REC. H10002 (daily ed. Nov. 5, 1997) (statement of Rep. Frost).

89. Reform Act, *supra* note 4, at § 1101(c)(1), 112 Stat. 693.

90. See *id.* § 1101(d), 112 Stat. 694.

91. See *id.* § 1101(d)(3)(A), 112 Stat. 694.

IRS officials.⁹² However, the Reform Act denies the Oversight Board authority with respect to the "the development and formulation of Federal tax policy[,] . . . law enforcement activities of the Internal Revenue Service[,] . . . [or] specific procurement activities of the Internal Revenue Service."⁹³

Supporters of the Reform Act insist that an oversight board consisting of private citizens will increase the IRS's accountability to taxpayers⁹⁴ and implement a check on the IRS's powers.⁹⁵ One Congressman stated that "[t]his oversight board will have real power and authority-it won't just be another governmental advisory board."⁹⁶ Yet, the Reform Act may not have granted the oversight board enough authority to initiate and oversee the changes necessary to substantially reform the management of the IRS.

C. Reform of the IRS Through Operation of the IRS Oversight Board

In the past, the Treasury Department has delegated its responsibility to manage the IRS to the Commissioner of the IRS.⁹⁷ Congress, through the Reform Act, has chosen to delegate a portion of the Treasury's managerial responsibilities to the Oversight Board.⁹⁸ Delegation of these tasks to the Oversight Board will improve management of the IRS to a certain degree.⁹⁹ However, whether this improvement is slight or substantial may best be determined by analyzing the four primary reasons for Congressional delegation of governmental tasks to advisory committees.¹⁰⁰

1. Citizens Appointed to Advisory Committees are Experts

Congress delegates governmental tasks to the private citizen members of advisory committees in deference to their expertise,¹⁰¹ as well as

92. See *id.* § 1101(d)(3)(C), 112 Stat. 694.

93. *Id.* § 1101(c)(2)(A)-(C), 112 Stat. 694.

94. See 143 CONG. REC. H10026 (daily ed. Nov. 5, 1997) (statement of Rep. McCrery).

95. See *id.* at H10023 (statement of Rep. Cardin).

96. *Id.* at H10005 (statement of Rep. Christensen).

97. See RIA, ANALYSIS OF THE REFORM ACT, *supra* note 57, at 1902, ¶ 5001.

98. See Reform Act, *supra* note 4, at § 1101, 112 Stat. 693.

99. See *infra* Part IV(C).

100. See *supra* notes 76-79 and accompanying text.

101. See *supra* note 76 and accompanying text. Abramson writes that "rather than developing detailed safety and health standards itself, Congress has delegated this complex task to specialized agencies These agencies have the technical staff and expertise to formulate legal standards and to adjudicate complex disputes." Abramson, *supra* note 76, at 220 n.71.

the likelihood that they have encountered and solved the problems that require government action.¹⁰² However, the expertise of the IRS Oversight Board may not be optimally utilized because their authority is limited.¹⁰³ The IRS Oversight Board lacks any authority with respect to the "basic problem"¹⁰⁴ of tax reform, which is revision of the code itself. The members are not assigned authority relating to the "development and formulation"¹⁰⁵ of the code. This limitation negates much of the potential effectiveness of the Oversight Board. The Oversight Board will probably include members who are experts in tax administration and compliance.¹⁰⁶ Yet, without more power, these experts will have no active role in the formulation or development of the code.¹⁰⁷

2. Advisory Committee Members are Insulated from Political Pressures

Congress also delegates responsibilities to members of advisory committees to reduce political influence over governmental decision-making tasks.¹⁰⁸ It appears the Oversight Board members are adequately isolated from most political pressures. The Oversight Board will be composed of nine members,¹⁰⁹ six of whom will be "private life" members.¹¹⁰ While each member will be appointed to only a five-year

102. See Abramson, *supra* note 76, at 179. One commentator stated, "[t]hose performing the operation or constituting a part of the relation to be regulated are likely to have a more urgent sense of the problem and the possibilities of effective solution: experience and experiment lie immediately at hand." Louis Jaffee, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 212 (1937).

103. See *infra* notes 104-105 and accompanying text.

104. See Peterson, *supra* note 21, at 52.

105. See Reform Act, *supra* note 4, at § 1101(c)(2)(A), 112 Stat. 694.

106. The members of the Oversight Board will be appointed based upon their expertise in the following areas: "(1) management of large service corporations; (2) customer service; (3) the Federal tax laws, including administration and compliance; (4) information technology; (5) organization development; and (6) the needs and concerns of taxpayers." RIA, ANALYSIS OF THE REFORM ACT, *supra* note 57, at 1906, ¶ 5003.

107. The members of the Oversight Board could play an inactive role (*i.e.*, informal advising or recommending) in the development and formulation of the tax code.

108. See *supra* note 77 and accompanying text. "By granting administrative agencies an effective independence from the normal political processes, Congress would ensure that administrators were free to be impartial in their judgments . . ." FREEDMAN, *supra* note 77, at 60.

109. See Reform Act, *supra* note 4, at § 1101(b)(1), 112 Stat. 691.

110. *Id.* § 1101(b)(1)(A). "Private life" members are those who are not otherwise government employees. *Id.* The other three members will be the Secretary of the Treasury, the Commissioner of the IRS, and "an individual who is a full-time Federal employee . . ." *Id.* § 1101(b)(1)(B)-(D), 112 Stat. 691.

term by the President¹¹¹ and could be removed from that position at the President's will;¹¹² it is difficult to imagine political motives affecting the decision making of the Board members. The private life members will be subject to certain ethical conduct rules requiring them to file public financial disclosure reports¹¹³ and restricting their post-Board employment.¹¹⁴ However, nothing in the Reform Act prohibits a private life member from continuing to be employed in the private sector. Thus, it is reasonable to suspect that these members could face a conflict between their Oversight Board responsibilities and the interests of their employers during their appointment.¹¹⁵

3. Advisory Committees are Flexible

Congress delegates governmental tasks to advisory committees because they are typically less constrained by the constitutional and administrative restrictions imposed upon governmental agencies.¹¹⁶

The IRS Oversight Board is a more flexible decision-making body than the IRS.¹¹⁷ However, the Board may not be able to take advantage of this flexibility because its members lack "actual authority,"¹¹⁸ such as the authority to formulate or develop policy.¹¹⁹ Instead, members of the Oversight Board are limited to exercises of "indirect authority"¹²⁰ such as conducting strategic and managerial reviews¹²¹ and making recom-

111. See *id.* § 1101(b)(2)(B), 112 Stat. 691.

112. See *id.* § 1101(b)(5)(A), 112 Stat. 693.

113. See *id.* § 1101(b)(3)(A), 112 Stat. 692; see also 5 U.S.C. app. 4 § 101(f) (1997); RIA, ANALYSIS OF THE REFORM ACT, *supra* note 57, at 1906-07, ¶ 5003.

114. See Reform Act, *supra* note 4, at § 1101(b)(3)(B), 112 Stat. 692; see also 18 U.S.C. § 207(c) (1997) (offering restrictions on aiding and advising); RIA, ANALYSIS OF THE REFORM ACT, *supra* note 57, at 1906-07, ¶ 5003.

115. See 143 CONG. REC. H10033 (daily ed. Nov. 5, 1997) (statement of Rep. Dreier). "H.R. 2676 would place management in the hands of people who, however well-meaning, are loyal and accountable to the firms and businesses that employ them." *Id.*

116. See *supra* note 78 and accompanying text. In comparison with administrative agencies, Congress's flexibility in formulating legislation is like "fitting a square peg into a round hole." COMER, *supra* note 76, at 16.

117. If for no other reason than the difference in size between the two groups.

118. See *infra* notes 120-23 and accompanying text.

119. See *supra* text accompanying notes 73, 89, and 93.

120. For a discussion on actual and indirect authority see Faure, *supra* note 73, at 495-96. Committees that simply advise an agency on policy have indirect authority. See *id.* These committees "have more narrow and manageable assignments than do general committees negotiating broad public policy." *Id.* (quoting Levine, *supra* note 80, at 218). A committee exercising actual authority has the ability to negotiate rulings and in some instances, the ability to pass regulation. See *id.*

121. See Reform Act, *supra* note 4, at § 1101(d)(1), (d)(3)(B)-(C), 112 Stat. 694.

mendations to the IRS concerning its policies and plans.¹²² The inability of Oversight Board members to exercise actual authority will lessen its ability to manage the IRS.

4. Advisory Committees Offer Continuous and Consistent Action

Congress delegates tasks to advisory committees that require continuous and consistent government action.¹²³ The Oversight Board is not an advisory committee capable of providing this type of action to the management and guidance of the IRS. The members of the Oversight Board are more akin to part-time advisors.¹²⁴ They will be minimally compensated¹²⁵ and only be required to meet quarterly.¹²⁶

In sum, it appears that the Oversight Board's ability to manage and guide the IRS is questionable. The Reform Act limits the decision-making authority of the members, effectively diminishing contributions from expert members. Additionally, the Oversight Board does not seem capable of providing continuous and consistent action to the guidance and management of the IRS.

Despite these limitations, the Oversight Board should provide some help to the IRS by offering advice and recommendations to the IRS. Additionally, these members have the potential to improve the IRS by providing it with unique extra-governmental ideas. Finally, the Board is in a position to improve the image of the IRS merely by making its purpose known to the public.

V. ENHANCED CIVIL REMEDIES AVAILABLE TO TAXPAYERS

This section examines the provisions of the Reform Act intended to enhance a taxpayer's ability to sue the government for civil damages caused by IRS employees.¹²⁷ In particular, this section discusses two civil damage remedies available to taxpayers via the code,¹²⁸ the changes to

122. See *id.* § 1101(d)(3)(A); 112 Stat. 694.

123. See *supra* note 80 and accompanying text; see also COMER, *supra* note 76, at 16-17. Comer indicates that the legislation promulgated by advisory committees has a greater value than the legislation promulgated by the other "fickle popular bodies" because advisory committees have a greater permanence and continuity than these other law makers. *Id.*

124. See Reform Act, *supra* note 4, at § 1101(e)(1)(A), (f)(3), 112 Stat. 695.

125. See Reform Act, *supra* note 4, at § 1101(e)(1)(A), 112 Stat. 695. Each member of the board shall not be compensated in excess of \$30,000 per year. See *id.*

126. See Reform Act, *supra* note 4, at § 1101(f)(2), 112 Stat. 695.

127. See Reform Act, *supra* note 4, at §§ 3101-3102, 112 Stat. 727-31.

128. This Comment discusses code sections 7430 and 7433. It does not discuss the civil remedies available to a taxpayer under code sections 7431 and 7432.

these remedies, and the effect the amended remedies have on a taxpayer's ability to successfully sue the government for civil damages. Finally, this section concludes that the amendments will only minimally enhance the taxpayer's ability to collect damages from the government in cases of IRS misconduct. These amendments are not thorough enough to advance taxpayers' interests or facilitate substantial IRS reform.

A. General Civil Remedies Available to Taxpayers

In 1976, Congress enacted the Civil Rights Attorney's Fees Awards Act¹²⁹ in response to an increasing awareness of IRS misconduct.¹³⁰ Since then, Congress has enacted additional legislation extending a taxpayer's ability to sue the government for damages created by IRS misconduct.¹³¹ This legislation includes statutes awarding taxpayers civil damages against the IRS for "unauthorized disclosure of returns and return information,"¹³² its "failure to release [a] lien,"¹³³ and for "certain unauthorized collection actions."¹³⁴ Although these statutes appear to provide broad remedies to taxpayers, courts and commentators have persistently criticized the statutes for their ambiguous provisions,¹³⁵ broad restrictions,¹³⁶ and limited effectiveness in assisting taxpayers.¹³⁷

1. Section 7430: Damages for Attorney's Fees

Section 7430 provides that reasonable attorney's fees and administrative costs may be awarded to a party prevailing against the United

129. See 42 U.S.C. § 1988. This act represented the initial authority by which a court could award reasonable costs to parties prevailing against the government in a civil tax litigation case. See Jerome S. Horvitz & Annette Hebble, "Substantial Justification" Further Defined by Phillips, 6 AKRON TAX J. 1, 2 (1989).

130. See R. Tracy Sprouls, *IRC §§ 7431 and 7433: Civil Remedies for Abusive Practices by the IRS*, 1 FLA. TAX REV. 563, 564 (1993).

131. For example, the Taxpayer Bill of Rights Acts. See *supra* note 13 and accompanying text.

132. I.R.C. §§ 7431, 7432, 7433 (1997).

133. *Id.* § 7432.

134. *Id.* § 7433.

135. See generally Dani Michele Miller, *Can the Internal Revenue Service be Held Accountable for its Administrative Conduct? The I.R.C. Section 7430 Fee Recovery Controversy*, 18 GOLDEN GATE U. L. REV. 371, 377 (1988).

136. See generally Sprouls, *supra* note 130; James T. Towe, *Is the IRS Above the Law? Potential Remedies for Taxpayers Damaged by Unlawful Conduct*, 55 MONT. L. REV. 469, 499-500 (1994).

137. See *supra* notes 135-36 and accompanying text.

States in any civil tax proceeding.¹³⁸ A taxpayer's ability to collect an award under the section is dependent upon a court's determination that "(1) the . . . position of the Government in the proceedings was not substantially justified, (2) the taxpayer exhausted the administrative remedies available to him, and (3) the taxpayer 'substantially prevailed' in the proceeding."¹³⁹

Courts have inconsistently interpreted section 7430¹⁴⁰ because of a "discrepancy between the statute's language and its legislative history."¹⁴¹ While the language of the section plainly provides that taxpayers may be awarded attorney's fees when they prevail against the IRS,¹⁴² its legislative history is inconsistent; it both reinforces and takes away from this language. The section's legislative history indicates that it was added to the code to "deter abusive actions or overreaching by the Internal Revenue Service"¹⁴³ However, the history also indicates that it was not added to the code "to open the floodgates for fee recovery from the IRS."¹⁴⁴

2. Section 7433, Damages for Unauthorized Collection Actions

Section 7433 provides that, in connection with the collection of taxes, a taxpayer may be awarded damages where an IRS employee recklessly or intentionally disregards the laws of the code.¹⁴⁵ To recover an award under section 7433, a taxpayer must show:

- (1) that an officer or employee of the Internal Revenue Service
- (2) disregarded a provision of the Internal Revenue Code or any regulation promulgated thereunder; (3) that this disregard was reckless or intentional; (4) that the disregard occurred in connection with the collection of federal tax with respect to the plaintiff;

138. See I.R.C. § 7430(a) (1997).

139. Horvitz & Hebble, *supra* note 129, at 4; see also I.R.C. § 7430(a) (1997).

140. For a general discussion on section 7430 and the difficulties in interpreting it, see Horvitz & Hebble, *supra* note 129, at 1; and Miller, *supra* note 135, at 371, 377.

141. Miller, *supra* note 135, at 373; see also H.R. REP. NO. 97-404, at 11 (1981).

142. See *supra* note 138 and accompanying text.

143. H.R. REP. NO. 97-404, at 11 (1981).

144. Miller, *supra* note 135, at 375; see also H.R. REP. NO. 97-404, at 11 (1981). Congress indicated that the IRS "should not necessarily be penalized for the reasonable pursuit of debatable tax issues. Tax administration would be ineffective if the Government conceded on all close cases to the taxpayer in order to avoid payment of fee awards." *Description of Law and Bills Relating to Awards of Attorney's Fees in Tax Cases, Joint Comm. on Taxation*, 97th Cong. 7 (1981).

145. See I.R.C. § 7433(a) (1997).

and (5) that the disregard was the proximate result of actual direct economic damages sustained by the plaintiff.¹⁴⁶

If taxpayers are able to prove all the elements of section 7433, they are entitled to damages not to exceed \$1,000,000.¹⁴⁷

Section 7433 has been the subject of significant criticism.¹⁴⁸ It provides a remedy only to those taxpayers who prove IRS employees have recklessly or intentionally disregarded the code.¹⁴⁹ Additionally, punitive damages are not awarded under this section.¹⁵⁰ Instead, damage awards are limited to "actual, direct economic damages."¹⁵¹ Finally, section 7433 targets only IRS misconduct occurring in connection with collection activities.¹⁵²

B. Proposed Amendments to Sections 7430 and 7433

By amending code sections 7430 and 7433, the Reform Act intends to enhance the list of taxpayer rights and protections that must be respected by the IRS when it exercises its collection and investigatory activities (known as the Taxpayer Bill of Rights).¹⁵³

1. Amended Section 7430

The Reform Act expands the authority of section 7430 to award damages to taxpayers when the IRS "is wrong."¹⁵⁴ Under the previous version of this section, a court had the authority to award higher attorney's fees based upon the determination of a special factor, "such as the limited availability of qualified attorneys for such [a] proceeding"¹⁵⁵

146. Sprouls, *supra* note 130, at 589-90; *see also* I.R.C. § 7433(a)(b) (1997).

147. *See* I.R.C. § 7433(b) (1997).

148. *See generally* Sprouls, *supra* note 130, at 565 (criticizing section 7433 for large and unjustifiable gaps in its coverage); Towe, *supra* note 136, at 499-500 (criticizing section 7433 for shortcomings that limit its ability to provide a complete remedy for damaged claimants).

149. *See* I.R.C. § 7433(a) (1997); Sprouls, *supra* note 130, at 592. "It will not suffice to show that the actions were negligent, or even grossly negligent." *Id.*

150. *See* I.R.C. § 7433 (1997); Sprouls, *supra* note 130, at 592; Towe, *supra* note 136, at 499-500.

151. I.R.C. § 7433(b)(1) (1997).

152. *See id.* § 7433(a); Sprouls, *supra* note 130, at 590. "Abuses connected with the assessment process are not covered and no action will lie, regardless of how grievous the abuses may be." *Id.*

153. *See* 143 CONG. REC. H10024 (daily ed. Nov. 5, 1997) (statement of Rep. Cardin), 143 CONG. REC. H10002 (daily ed. Nov. 5, 1997) (statement of Rep. Frost) ("This legislation . . . will substantially strengthen taxpayers rights in dealing with the IRS.").

154. *See id.* at H10026 (statement of Rep. McCrery).

155. I.R.C. § 7430(c)(1)(B)(iii) (1997).

The amended section expands a court's authority to award higher attorney's fees by creating additional special factors, such as "the difficulty of the issues presented in the case, or the local availability of tax expertise"¹⁵⁶ Additionally, amended section 7430 broadens the definition of the term reasonable administrative costs.¹⁵⁷ Similarly, the amendment broadens the definition of "attorney's fees"¹⁵⁸ to include amounts deemed appropriate for the services of an attorney working on a pro bono basis.¹⁵⁹ Finally, amended section 7430 includes a provision to assist a court in determining whether the government's position was substantially justified in a proceeding.¹⁶⁰ This provision allows a court to take into account "whether the [government] has lost in courts of appeal . . . on substantially similar issues."¹⁶¹

2. Amended Section 7433

The Reform Act amends section 7433 by increasing a taxpayer's ability to sue the government for unauthorized collections actions.¹⁶² A taxpayer is allowed to proceed under the section when an employee of the IRS negligently disregards the tax code.¹⁶³ Additionally, the amended statute re-establishes the requirement that taxpayers exhaust all available administrative remedies before obtaining a judgment for damages.¹⁶⁴

C. Effects of the Amended Civil Remedies

Congress amended sections 7430 and 7433 of the tax code with intentions "to prevent [and] discourage abusive behavior by IRS employees . . . [and] to clarify and codify the protections available to taxpayers in proceedings with the IRS"¹⁶⁵ Whether the amendments will meet Congress's intentions may best be determined by examining how the amendments address the criticisms of these sections of the tax code.

156. Reform Act, *supra* note 4, at § 3101(a)(2), 112 Stat. 727-728.

157. *See id.* § 3101(b), 112 Stat. 728.

158. *Id.* § 3101(c)(3), 112 Stat. 728.

159. *See id.* § 3101(c)(3)(B), 112 Stat. 728.

160. *See id.* § 3101(d), 112 Stat. 728.

161. *Id.*

162. *See* Reform Act, *supra* note 4, at § 3102, 112 Stat. 730.

163. *See id.* § 3102(a)(1)(A), 112 Stat. 728. However, the government's liability is capped at \$100,000 when a taxpayer proceeds under a theory of negligence. *See id.* § 3102(b)(1), 112 Stat. 730.

164. *See id.* § 3102(a)(2), 112 Stat. 730.

165. 143 CONG. REC. H10026 (daily ed. Nov. 5, 1997) (statement of Rep. Coyne).

1. The Effectiveness of Amended Section 7430 as a Civil Remedy

Section 7430 has been criticized for the discrepancy between its language and legislative history¹⁶⁶ that has resulted in inconsistent interpretation by courts.¹⁶⁷ While the Reform Act clarifies the language of the section, the changes are not substantial enough to remedy the section's real problem, its conflicting legislative history.

The Reform Act includes criteria to assist a court in determining whether a position of the government in a proceeding is "substantially justified."¹⁶⁸ Specifically, a court is directed to "take into account whether the United States has lost in courts of appeals for other circuits on substantially similar issues[.]"¹⁶⁹ This eliminates attempts by the government to create a conflict among the appellate courts.¹⁷⁰ Previously, such attempts could be considered substantially justified even though another court may have ruled against the government on the same issue.¹⁷¹ This provision enhances a taxpayer's ability to collect damages from the government. However, Congress does not change the language of section 7430 enough to resolve the discrepancy in its legislative history.¹⁷² Taxpayers will be required to exhaust administrative remedies¹⁷³ and substantially prevail in proceedings in order to receive an award for damages.¹⁷⁴ The language of amended section 7430 is not substantially different from its predecessor. Therefore, courts will continue to rely upon its conflicting legislative history and inconsistently interpret section 7430.

166. See *supra* notes 142-43 and accompanying text.

167. See Miller, *supra* note 135, at 377. Miller highlights the appellate courts varying interpretations of section 7430. The Eleventh and District of Columbia Circuit Courts of Appeal have interpreted section 7430 narrowly and have awarded few litigation costs to taxpayers. See *Baker v. Commissioner*, 787 F.2d 637, 641-42 (D.C. Cir. 1986); *Ewing v. Heye*, 803 F.2d 613 (11th Cir. 1986). In contrast, the First and Fifth Circuit Courts of Appeal have interpreted section 7430 broadly and have been inclined to award taxpayers fees. See *Powell v. Commissioner*, 791 F.2d 385 (5th Cir. 1986); *Kaufman v. Egger*, 758 F.2d 1 (1st Cir. 1985).

168. Reform Act, *supra* note 4, at § 3101(d), 112 Stat. 728.

169. *Id.*

170. See Horvitz & Hebble, *supra* note 129, at 5 (citing *Technical Explanation of Committee Amendment*, 127 CONG. REC. S15594 (daily ed. Dec. 16, 1981)).

171. "Generally, the pursuit of litigation by the government to establish a conflict among the United States Circuit Courts of Appeals would not be unreasonable." H.R. REP. NO. 97-404, at 12 (1981).

172. See *supra* notes 141-42 and accompanying text.

173. See Reform Act, *supra* note 4, at § 3102(a)(2), 112 Stat. 730.

174. See I.R.C. § 7430(c)(4)(A)(i)(I)-(II) (1997).

2. The Effectiveness of Amended Section 7433 as a Civil Remedy

Previously, section 7433 contained provisions that unfairly restricted the factual circumstances under which a taxpayer could be awarded damages.¹⁷⁵ The Reform Act removed only some of these restrictions. Those that remain, however, will prevent taxpayers from collecting damages to which they are entitled.

The Reform Act directly addressed one criticism of the section by amending it to allow a taxpayer to bring suit against the government in instances where an IRS employee has negligently disregarded a law of the code.¹⁷⁶ This negligence standard adopted by amended section 7433 will increase the number of instances where a taxpayer could file a cause of action¹⁷⁷ by imposing a burden upon the taxpayer that is more closely aligned with the "knowingly, or by reason of negligence"¹⁷⁸ standard of sections 7431 and 7432.¹⁷⁹ Furthermore, by adding this language to the statute, the IRS will no longer be able to avoid liability by simply showing that its agents were negligently unaware of the code statute that they have violated.¹⁸⁰

However, section 7433 will still be criticized because it limits awards of damages to claimants. Taxpayers will remain limited to collecting the lesser of \$1,000,000 (\$100,000 in instances of negligence)¹⁸¹ or the sum of the taxpayer's "actual, direct economic" damages.¹⁸²

Additionally, section 7433 still applies only to the collection activities of IRS employees.¹⁸³ As a result, a taxpayer has no cause of action for damages where the IRS incorrectly assesses tax liability, yet utilizes correct collection procedures.¹⁸⁴ Section 7433's failure to authorize such a

175. See *supra* notes 148-52 and accompanying text.

176. See Reform Act, *supra* note 4, at § 3102(a)(1)(A), 112 Stat. 728.

177. See *United States v. Toyota*, 772 F. Supp. 481 (E.D. Cal. 1991) (holding that at most IRS's actions constituted negligence and therefore taxpayer is not entitled to recover damages).

178. I.R.C. §§ 7431(a)(1), 7432(a) (1997).

179. See Sprouls, *supra* note 130, at 592 (comparing the standard necessary for liability under section 7431 with that of section 7433).

180. See *id.* at 602. Sprouls believes that section 7433, as previously enacted, encouraged a "shield of ignorance" where the IRS would inadequately inform its agents of collection laws and thereby escape liability. *Id.*

181. See Reform Act, *supra* note 4, at § 3102(a)(1)(B), 112 Stat. 730.

182. Compare I.R.C. § 7433(b), with I.R.C. §§ 7430(a), 7431(c), 7432(b) (section 7433 caps damages to an actual, direct economic amount while the other sections impose no such limitation); see also Sprouls, *supra* note 130, at 583.

183. See I.R.C. § 7433(a); *supra* note 145.

184. See *Shaw v. United States*, 20 F.3d 182 (1994) (holding taxpayer cannot seek dam-

cause of action limits its ability to advance taxpayers' interests.

Lastly, amended section 7433 re-establishes the requirement that taxpayers exhaust all available administrative remedies in order to obtain a judgment for damages.¹⁸⁵ Previously, section 7433 stated that damages "may be reduced if administrative remedies [are] not exhausted."¹⁸⁶ Amended section 7433 will likely be criticized because taxpayers will encounter an additional burden in their attempts to collect damages under the statute.¹⁸⁷

VI. ANALYSIS: ALTERNATE REFORM SUGGESTIONS

Before the Reform Act was signed into law by the President, a critic of the legislation stood before the Senate Finance Committee and said that it "was much less than meets the eye."¹⁸⁸ Alternatively, this critic suggested that the most effective means of reforming the IRS would be "legislation of basic fairness and taxpayer respect."¹⁸⁹ In consideration of these statements and the criticisms offered throughout this work, Congress should consider modifying the Reform Act.

First, a modified Reform Act, one which requires the IRS to treat taxpayers with greater fairness and respect, should assign the burden of proof to the taxpayers in all court proceedings relating to the determination of a tax liability. A tax system assigning the IRS the burden of proof will unfairly necessitate a greater amount of government intrusion into the lives of taxpayers.¹⁹⁰ Additionally, revenue collection will be substantially impaired if the IRS bears the burden of proof.¹⁹¹ Principles of fairness and respect dictate that the burden of proof remain with the taxpayer.

ages under section 7433 where IRS improperly assessed tax liability but engaged in proper collection procedures). *But see* Sprouls, *supra* note 130, at 595 (citing *Miklautsch v. Gibbs*, 90-2 U.S. Tax Cas. (CCH) ¶ 50,587 (D. Alaska 1990) (rejecting government's argument that section 7433 is inapplicable where procedurally correct collection methods are used, regardless of whether the underlying tax is correctly assessed)).

185. *See* Reform Act, *supra* note 4, at § 3102(a)(2), 112 Stat. 730.

186. I.R.C. § 7433(d)(1) (1997).

187. *See* *Conforte v. United States*, 979 F.2d 1375 (1992) (holding that taxpayer can not sue under section 7433 without exhausting her administrative remedies); *Sintz, Campbell, Duke & Taylor v. United States*, 197 B.R. 351 (S.D. Ala. 1996) (holding that absent a showing of exhaustion of remedies, law firm could not maintain a cause of action).

188. *IRS Restructuring: Hearings on Internal Revenue Service Restructuring Before the Senate Finance Comm.*, 105th Cong., (1998) (statement of Robert S. Schriebman) available in 1998 WL 47010.

189. *Id.*

190. *See supra* notes 65-68 and accompanying text.

191. *See supra* notes 69-71 and accompanying text.

Second, the Reform Act was correct in creating the IRS Oversight Board. A functioning Oversight Board consisting of a group of well-qualified private life members will increase the IRS's accountability to taxpayers by providing it with non-politically motivated advice and recommendations.¹⁹² However, the legislation creating an oversight board must be modified to provide its members with the direct authority to formulate and enforce IRS policy. A board whose authority is limited to recommending and reviewing policy is useless in a bureaucracy as large as the IRS.¹⁹³

Third, the civil remedies available to taxpayers must continue to be amended to authorize expanded damage awards. While the Reform Act minimally enhances these remedies, it does not go far enough. Congress should continue to modify phrases such as "substantially justified" and "substantially prevailed" that unreasonably restrict the ability of taxpayers to collect damages under section 7433. Additionally, the IRS should not have its potential liability capped or limited to actual direct economic damages. Instead, the IRS should be treated like any other party found liable in a civil suit: It should pay an amount of money equal to the wrong it inflicted.

Finally, Congress, in amending the civil remedies statutes, should be motivated by the knowledge that these statutes provide necessary IRS accountability, and not be deterred by a fear that they will open the floodgates to fee recovery from the IRS.¹⁹⁴

VII. CONCLUSION

Taxpayers and politicians agree that the IRS needs to be reformed to fairly and efficiently administer the tax system. However, the precise means of such reform remains a mystery. The Reform Act will not adequately reform the IRS because its provisions are not forceful enough to affect the way the IRS does business. Until such legislation is enacted, taxpayers must continue to live with an agency that is out of control.

WM. BRIAN HENNING*

192. See *supra* notes 97-126 and accompanying text.

193. See BURNHAM, *supra* note 21, at 16.

194. See *supra* note 144 and accompanying text.

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